Lau Chee Ching v Niah Native Logging Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO Q–02–465 OF 1997
MOKHTAR SIDIN, MOHD SAARI AND ALAUDDIN JJCA
10 JUNE 2002

Civil Procedure *— Appeal — Striking out — Execution of deed of settlement — Failure to pay instalments as stipulated in deed — Whether a proper case for the statement of defence to be struck out*

The appellant was employed by the respondent as a company secretary. During his tenure of office, it was alleged that the appellant failed to account for RM2,585,828.01 which formed the subject matter of dispute in the present action. The upshot of the said allegation was that the respondent lodged a police report and also instituted two civil suits against the appellant. Later, both parties executed a deed of settlement ('the deed'). Under the deed, the appellant agreed to pay the respondent RM1.2m by instalments on dates stipulated in the deed. In consideration, the respondent agreed to withdraw the police report and two civil suits. The appellant, after paying a total sum of RM460,000 stopped payment of instalments, hence the respondent filed the present action. In the court below, the respondent applied and obtained an order under O 18 r 19 of the Rules of the High Court 1980 to strike out the appellant's statement of defence. The appellant appealed against the said order.

Held, allowing the appeal:

Having regard to the words 'any of the instalments' as stated in cl 4(a) of the deed, it seemed to suggest that the respondent was entitled to enforce the deed and to insist on full payment of RM2,585.828.01 less the amount paid, in the event that the appellant defaulted payment of any of the instalments. In construing the words 'any of the instalments' in cl 4(a), it appeared that cl 4(a) also applied to cl 3(a), which was the illegal part of the deed. On the question of whether cl 3(a) was severable, it would depend on the facts and circumstances of each case. The judgment of the learned judicial commisioner was flawed as she had failed to address her mind on the words 'any of the instalments' in cl 4(a) of the deed, which amounted to a misdirection. Applying the principle enunciated in *Low Yat v GC Grace* [1947] MLJ 115 to the facts, the court was of the view that this was not a proper case for the statement of defence to be struck out (see pp 11H–12A, E–F).

[Bahasa Malaysia summary

Perayu telah diambil bekerja oleh responden sebagai setiausaha syarikat. Ketika tempoh memegang jawatan tersebut, telah didakwa bahawa perayu telah gagal untuk memperjelaskan mengenai

RM2,585,828.01 yang mana telah membentuk hal perkara pertikaian dalam tindakan semasa. Kesudahan daripada dakwaan tersebut adalah bahawa responden telah membuat laporan polis dan juga memulakan dua guaman sivil terhadap perayu. Kemudiannya, kedua-dua pihak telah menyempurnakan satu suratikatan penyelesaian ('suratikatan tersebut'). Di bawah suratikatan tersebut, perayu bersetuju untuk membayar kepada responden RM1.2j melalui ansuran pada tarikh-tarikh sepertimana yang ditetapkan di dalam suratikatan tersebut. Sebagai balasannya, responden telah bersetuju untuk menarik balik laporan polis dan kedua-dua guaman sivil. Selepas membuat pembayaran yang berjumlah sebanyak RM460,000 perayu telah berhenti membuat pembayaran ansuran-ansuran seterusnya, maka responden telah memfailkan tindakan semasa. Dalam mahkamah di bawah, responden telah memohon dan mendapatkan satu perintah di bawah A 18 k 9 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk membatalkan pernyataan pembelaan. Perayu telah merayu terhadap perintah tersebut.

Diputuskan, membenarkan rayuan tersebut:

Berhubung dengan perkataan-perkataan 'any of the instalments' sepertimana yang dinyatakan di dalam fasal 4(a) suratikatan tersebut, ia nampaknya menyarankan bahawa responden berhak untuk menguatkuasakan suratikatan tersebut dan mendesak untuk mendapatkan pembayaran penuh sebanyak RM2,585.828.01 ditolak jumlah yang telah dibayar, sekiranya perayu ingkar membayar mana-mana dari ansuran-ansuran tersebut. Dalam mentafsirkan perkataan-perkataan 'any of the instalments' di dalam fasal 4(a), nampaknya bahawa fasal 4(a) juga terpakai pada fasal 3(a), yang mana adalah bahagian tidak sah suratikatan tersebut. Mengenai persoalan sama ada fasal 3(a) boleh diasingkan, ianya bergantung pada fakta-fakta dan keadaan-keadaan setiap satu kes. Penghakiman yang arif pesuruhjaya kehakiman adalah tidak sempurna kerana beliau telah gagal untuk menumpukan pemikirannya kepada perkataan-perkataan 'any of the instalments' di dalam fasal 4(a) dari suratikatan tersebut, yang mana membawa kepada suatu salah-arahan. Memakai prinsip yang disebut di dalam *Low Yat v GC Grace* [1947] MLJ 115 kepada fakta-fakta, mahkamah berpendapat bahawa ini bukannya satu kes yang wajar bagi membatalkan pernyataan pembelaan (lihat ms 11H–12A, E–F).]

Notes

For cases on striking out, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1220–1224.

Cases referred to

Low Yat v GC Grace [1947] MLJ 115 (folld)

Ooi Kiah Inn Charles v Kukuh Maju Industries Sdn Bhd [1993] 2 MLJ 224 (refd) A

Legislation referred to

Contracts Act 1950 ss 24, 25
Rules of the High Court 1980 O 18 r 19 B

Appeal from: Suit No MR 27 of 1990 (High Court, Miri)

Wong Chong Wah (*Dennis YM Lau* and *Elaine Yap* with him) (*Jamal & Lau*) for the appellant.
Chong Siew Chiang (*Lawrence YS Lai* with him) (*Awang, Lai, Sandhu & Co*) for the respondent. C

Mohd Saari JCA (delivering judgment of the court): In the court below, the respondent ('the plaintiff') applied and obtained an order under O 18 r 19 of the Rules of the High Court 1980 ('the RHC') for striking out the statement of defence. The present appeal is by the appellant ('the defendant') against the said order. D

The salient facts as disclosed in the affidavits are as follows.

Between 1 March 1979 and 27 April 1989, the plaintiff employed the defendant as a company secretary. During his tenure of office, it was alleged that the defendant had failed to account for RM2,585,828.01 which formed the subject matter of dispute in the present action. The upshot of the said allegation was that the plaintiff lodged a police report and also instituted two civil suits against the defendant. E

Later on 10 November 1989, both parties executed a deed of settlement (exh W1) ('the deed'). Under the deed, the defendant agreed to pay the plaintiff RM1.2m by instalments on dates as stipulated in the deed. In consideration, the plaintiff agreed to withdraw the police report and two civil suits namely MR 48/89 and MR 49/89. F

Pursuant to the terms of the deed, the plaintiff withdrew the police report and the two civil suits. In the case of the defendant, after paying a total sum of RM460,000 the defendant stopped payment of instalments, hence the plaintiff filed the present action. G

Under the deed, the parties agreed as follows:

> LCC shall pay to the company the sum of MALAYSIAN RINGGIT ONE MILLION AND TWO HUNDRED THOUSAND (RM1,200,000) only as follows: H
>
> (a) the sum of MALAYSIAN RINGGIT TWO HUNDRED THOUSAND (RM200,000) only on or before the 30 November 1989;
>
> (b) the balance sum of MALAYSIAN RINGGIT ONE MILLION (RM1,000,000) only shall be paid by LCC in five (5) equal monthly instalments of MALAYSIAN RINGGIT TWO HUNDRED THOUSAND (RM200,000) only each and in this respect, LCC shall deposit five postdated cheques (as particularized below) with Messrs CC Lau & Co as stakeholders: I

DATE	AMOUNT
30 December 1989	RM 200,000
30 January 1990	RM 200,000
28 February 1990	RM 200,000
30 March 1990	RM 200,000
30 April 1990	RM 200,000
	RM 1,000,000

(not applicable)

In consideration of the payment of RM1.2m under cl 1 above, the company agrees to do the following:

(a) to withdraw the said police report upon receipt of the sum of RM200,000 under cl 1(a) above;

(b) to discontinue the said Suits No MR 48/89 and No MR 49/89 against LCC upon receipt of the balance of RM1m under cl 1(b) above; and

(c) to release LCC from all obligations, liabilities and debts in respect of the operation of the company at all times.

It is mutually agreed by the parties as follows:

(a) that in the event of default of payment of any of the instalments or if any of the cheques particularised in cl 1 above were dishonoured upon presentation for payment, then the company shall be entitled to sue LCC for the full sum of RM2,585.828.01 after deducting whatever money paid by LCC to the company under cl 1 above; and

(b) that upon full payment of RM1.2m under cl 1 above, neither party shall have any claim whatsoever against the other party in respect of the operation of the company at all times.

In this pleading, it was averred by the defendant that the deed was illegal, void and unenforceable as being contrary to ss 24 and/or 25 of the Contracts Act 1950. Reference was made to the case of *Ooi Kiah Inn Charles v Kukuh Maju Industries Sdn Bhd* [1993] 2 MLJ 224. In that case, Peh Swee Chin SCJ (as he then was) at p 231 observed:

> Such contracts to stifle prosecution are unlawful because their consideration or object is against public policy and they are caught by the second limb of s 24(e) of the [Contracts] Act [1950].

Mr Chong, learned counsel for the plaintiff, submitted that cl 3(a) which was on withdrawal of the Police report was independent of the rest of the deed. He contended that cl 3(a) is severable.

Having regard to the words 'any of the instalments' as stated in cl 4(a) of the deed, it seems to suggest that the plaintiff is entitled to enforce the deed and to insist on full payment of RM2,585.828.01 less the amount paid, in the event that the defendant defaulted payment of any of the instalments. In construing the words 'any of the instalments' in cl 4(a), it

appears that cl 4(a) also applies to cl 3(a) which is the illegal part of the deed. On the question of whether cl 3(a) is severable, it would depend on the facts and circumstances of each case. In this regard, it is pertinent to refer to Pollock & Muller on *Indian Contract and Specific Relief Acts* (10th Ed) at p 289 which states:

> A promise made for an unlawful consideration cannot be enforced, and there is not any promise for a lawful consideration if there is anything illegal in a consideration which must be taken as a whole. On the other hand, it is well settled that if several distinct promises are made for one and the same lawful consideration, and one or more of them be such as the law will not enforce, that will not of itself prevent the rest form being enforceable. The test is whether a district consideration which is wholly lawful can be found for the promise called in question. The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; ...

In *Low Yat v GC Grace* [1947] MLJ 115, the plaintiff filed a suit against the defendant claiming damages for assault and wrongful imprisonment. The defendant applied for the plaint to be struck out on the ground that it disclosed no reasonable cause of action. In that case, Willan CJ (as he then was) at p 119 said:

> I cannot say that this is a plain and obvious case in which I should act under 1932 Rule 1 sub-rule 33. In my view there is an issue which should be tried, and it can only be tried by the action pursuing its normal course and being heard in court.

Turning to the judgment of the learned JC, with greatest respect, we find that her judgment is flawed as she had failed to address her mind on the words 'any of the instalments' in cl 4(a) of the deed, which amounted to a misdirection.

Applying the principle enunciated in *Low Yat* to the facts, we are of the view that this is not a proper case for the statement of defence to be struck out. Accordingly, we allow the appeal and remit the case back to the court below for the case to be tried. The plaintiff to pay cost here and below and we further order for the deposit to be refunded.

Both my learned brothers, Mokhtar Sidin JCA and Alauddin JCA, have read this judgment in draft and have expressed their agreement.

Appeal allowed.

Reported by Peter Ling